STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

Case No. 13-005130-FC
CofA#: 318680
SCt#: 151439

PHILLIP JOSEPH SWIFT,

Defendant-Appellant.

Kym L. Worthy (P38875)
Attorney for Plaintiff
1441 St. Antoine, 12th Floor
Detroit, MI 48226
(313) 224-5777

Ronald D. Ambrose (P45504)
Attorney for Defendant
16818 Farmington Road
Livonia, MI 48154-2974
(c) (248) 890-1361

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

TABLE OF CONTENTS

INDEX OF AUTHORITIES

page

STATUTES AND OTHER AUTHORITIES

STATEMENT IDENTIFYING JUDGMENT BEING APPEALED

Defendant-Appellant Phillip Joseph Swift submits this supplemental brief in support of application for leave to appeal. The Judgment being appealed is the February 19, 2015 unpublished opinion issued the Michigan Court of Appeals. Defendant filed his application for leave to appeal to this Court on April 17, 2015. ("Pro Per Application For Leave To Appeal," 4/17/15.) After the prosecution responded to Defendant's application, this Court issued an Order dated October 12, 2016 ordering the trial court to appoint appellate counsel and directing, within 42 days of the appointment, that

> [t]he parties shall file supplemental briefs within 42 days of the date of the order appointing counsel, addressing: (1) whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day time requirement under MCL 769.13, and (2) if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13. With regard to the latter issue, see In re Forfeiture of Bail Bond, 496 Mich 320, 330 (2014); see also MCL 769.26 and MCR 2.613. The parties should not submit mere restatements of their application papers.

("Order," 10/12/16.)

Substitute appellate counsel was appointed on October 21, 2016. ("Claim Of Appeal And Order Appointing Counsel—Substitution Order," 10/21/16.)

STATEMENT OF QUESTIONS PRESENTED

I. IS DEFENDANT ENTITLED TO RESENTENCING AS A NON-HABITUAL OFFENDER WHERE THE PROSECUTOR'S OFFICE FAILED TO SERVE THE HABITUAL OFFENDER NOTICE AS REQUIRED BY STATUTE AND COURT RULE?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The Court of Appeals says "no."

The trial court says "no."

STATEMENT OF FACTS

Defendant-Appellant Phillip Joseph Swift was charged with armed robbery; first-degree home invasion; unarmed robbery; discharging a firearm at a building; and felony firearm. (Transcript, "Video Felony Arraignment," 5/25/13.) After the charges were read at the video arraignment, the clerk states: "Defendant has a second offense notice also a habitual third offense notice." (Id., p 3.) There was no indication of the prosecution being present and no indication that Defendant was served with any papers. (Id.) Additionally, there was no information provided to Defendant regarding the prior offenses being relied upon to enhance the sentence. (Id.)

At the arraignment on the information, Defendant's counsel was absent and an attorney stood in, and waived formal reading of the information. (Transcript, "Arraignment On The Information," p 3, 6/13/13.) Again, there is no indication Defendant or his counsel was served with the Information and/or the habitual enhancement. (Id.)

The case proceeded to a jury trial with Defendant being found guilty of unarmed robbery and first-degree home invasion. (Transcript, "Jury Trial (Continuing)," p 72, 9/6/13.) He was acquitted on the remaining charges. (Id.)

At the time of sentencing, the court remarked: "So the guidelines are scored at 84 to 140 [months]." (Transcript, "Sentence," p 11, 9/23/13.) The

prosecution disagreed, stating: "I actually have them 84 to 210 [months] because he's a habitual 3rd." (Id.) Thereafter, Defendant was sentenced to 12 years to 40 years on the first-degree home invasion offense, and 12 years to 30 years on the unarmed robbery offense. (Id., p 15.)

Defendant was appointed appellate counsel for an appeal and a motion for resentencing was filed. (Transcript, "Motion," 2/28/14.) Defendant argued that his sentence should not have been enhanced as he was not provided appropriate notice. (Id., pp 3-4.) The court denied the motion, stating: "I do think that there has been compliance. The defendant was on notice with regards to the habitual in this matter. Your objection is noted, but the motion for resentencing is denied." (Id., p 7.)

An appeal followed, again raising the sentencing issue (among others). The Court of Appeals affirmed the conviction and sentence, finding no sentencing relief was warranted:

> In this case, defendant was arraigned in circuit court on the felony information on June 13, 2013, meaning that the prosecutor's deadline to file notice in compliance with MCL 769.13 was 21 days from that date. See People v Williams, 462 Mich 882; 617 NW2d 330 (2000). Relevant to this obligation, the felony warrant and felony complaint, both filed in the district court on May 24, 2013, before defendant's arraignment, contained a written notice of the prosecution's intent to seek a sentence enhancement, and this written notice included a listing of defendant's prior convictions on which the prosecution intended to rely in seeking sentencing enhancement. Written notice was also provided in an unsigned copy of the felony information dated May 24, 2013. In short, the prosecutor fulfilled its obligation to provide written

> notice within 21 days of defendant's arraignment as required by MCL 769.13(1).
>
> . . . .
>
> At most, fairly read, defendant's claim on appeal amounts to the assertion that there was no proof of service in the lower court record as required by MCL 769.13(2). But, any oversight in this regard constituted harmless error because defendant had notice of the prosecution's intent to seek an enhanced sentence under the habitual offender statute and the prosecution's actions did not prejudice defendant's ability to respond to the habitual offender notice. See Walker, 234 Mich App at 314-315. [People v Walker, 234 Mich App 299, 314; 593 NW2d 673 (1999).] Specifically, notice was provided to defendant in the documents detailed above, and when the prosecutor noted at sentencing that defendant was a third habitual offender, neither defendant nor defendant's attorney challenged the prosecutor's assertion or claimed a lack of notice. Based on defendant's criminal history, the trial court also concluded during sentencing that defendant was a third habitual offender. Defendant did not challenge the trial court's findings in this regard, and he does not argue on appeal that he had any viable challenge to the habitual offender enhancement. On these facts, the prosecution's failure to file a proof of service constituted harmless error. Defendant is not entitled to resentencing.

(Footnote omitted.)

Defendant appealed the Court of Appeals ruling, raising a number of issues, one of which involved the sentence enhancement issue. ("Pro Per Application For Leave To Appeal," 4/17/15.) On April 6, 2016, this Court ordered directed "the Wayne County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of this order. In particular, we direct the prosecutor to respond to the question whether the defendant or his attorney was personally served with a copy of the information containing the habitual offender notice at the arraignment. If not, the

prosecutor is directed to explain when and how the habitual offender notice was served on the defendant or his attorney." ("Order," 4/6/16.)

The prosecution responded by arguing that "written notice of the enhancement was filed when defendant was first charged and the enhancement notice was then read to defendant on the record at the arraignment on the warrant. Defendant was provided timely notice of the enhancement." ("Plaintiff-Appellee's Answer To Defendant-Appellant's Pro Per Application For Leave To Appeal," p 5, 6/29/16.) Again, as stated above, Defendant was not informed of the prior offenses being relied upon. Also, the enhancement notice, that contains the prior offenses, was not served upon him.

The prosecution further argues that at the arraignment on the information, "defendant chose to waive the formal reading of the information as is permitted under MCR 6.113(B), signaling that he did not need it read to him because he already had a copy of the information." (Id., p 11.) There is no such verification within the record, however, that Defendant received a copy of the Information.

Although this Court directed two things from the prosecution: "[1] to respond to the question whether the defendant or his attorney was personally served with a copy of the information containing the habitual offender notice at the arraignment. [2] If not, the prosecutor is directed to explain when and

how the habitual offender notice was served on the defendant or his attorney." ("Order," 4/6/16.) The prosecution has done neither.

On October 12, 2016, this Court directed the appointment of appellate counsel for Defendant and required the parties to file supplemental briefs within 42 days of the date of the appointment of counsel. ("Order," 10/12/16.) In its Order, the Court states supplemental briefing should address the following: "(1) whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day time requirement under MCL 769.13, and (2) if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13. With regard to the latter issue, see In re Forfeiture of Bail Bond, 496 Mich 320, 330 (2014); see also MCL 769.26 and MCR 2.613. The parties should not submit mere restatements of their application papers." (Id.)

Substitute appellate counsel was appointed for Defendant on October 21, 2016. ("Claim Of Appeal And Order Appointing Counsel—Substitution Order," 10/21/16.)

ARGUMENT

I. DEFENDANT IS ENTITLED TO RESENTENCING AS A NON-HABITUAL OFFENDER WHERE THE PROSECUTOR'S OFFICE FAILED TO SERVE THE HABITUAL OFFENDER NOTICE AS REQUIRED BY STATUTE AND COURT RULE

Defendant-Appellant Phillip Joseph Swift should be resentenced without the habitual offender enhancement. The prosecution failed to follow the statute and court rule regarding the filing and service of the habitual notice. The habitual offender notice allegedly filed (but never served) prior to the Defendant's arraignment on the information does not satisfies the 21-day time requirement under MCL 769.13 or MCR 6.112(F).

The standard of review is de novo. Questions of law, including the correct interpretation and application of statutes and constitutions, are reviewed de novo. Paris Meadows, LLC v City of Kentwood, 287 Mich App 136, 141 (2010); People v Gahan, 456 Mich 264, 275-276 (1997).

Defendant asserts that his habitual offender status is void in this case because the filing and service requirements of MCL 769.13 and MCL 6.112(F) were not met. The record is devoid of Defendant or his counsel being served with the habitual offender notice. There is no proof of service in the file, and the prosecution cannot show "whether the defendant or his attorney was personally served with a copy of the information containing the habitual offender notice at the arraignment" as it sidestepped this Order in its answer to

the application. (See, "Order," 4/6/16.) Further, the prosecutor is unable "to explain when and how the habitual offender notice was served on the defendant or his attorney" as it sidestepped this second question posed by this Court. (Id.)

The fact of the matter is as follows: The prosecution failed to serve the habitual notice, as required by statute and court rule, upon Defendant or his attorney. As written notice is required before sentence enhancement may take place under the habitual offender laws, Defendant is entitled to resentencing.

Under MCL 769.13(1), the prosecutor "may" seek to enhance a sentence by filing a written notice within 21 days of arraignment on the information or within 21 days of the filing of the information, if arraignment is waived:

> Sec. 13. (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if the arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

Under MCL 769.13(2), the "notice shall be filed with the court **and served** upon the defendant or his or her attorney within the time provided in subsection (1)." (emphasis added). A written proof of service must also be filed with the clerk of the court. Id.

Further support for Defendant's position is reflected within MCR 6.112(F) and (G), which states:

> (F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice **must** be filed within 21 days **after** the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days **after** the filing of the information charging the underlying offense.
>
> (G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. **This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence**.

(Emphasis added.)

The language of MCL 769.13(2) and MCR 6.112(F) are not permissive—they are mandatory. Further, these requirements create a bright line rule. People v Morales, 240 Mich App 571 (2000); People v Bollinger, 224 Mich App 491 (1997). There is no requirement of a showing of objection and/or prejudice. MCR 6.112(G). Similarly, the statute plainly states that not only must the habitual notice be filed, but it **must be served.** Since MCL 769.13(2) clearly mandates that the "notice shall be filed with the court **and** served", service is no less a part of the fundamental requirement for the court's initial jurisdiction than the filing of the habitual offender supplement.

In the present case, service of the habitual offender notice was never served on Defendant or his attorney—the prosecution cannot show when and how service was accomplished since it never was served. Further, merely stating to Defendant at a video arraignment, where communication is not the best, that "Defendant has a second offense notice also a habitual offender third offense notice" without serving written notification showing the prior offenses does not conform to the statute. See MCL 769.13(2) (The habitual offender notice "shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1).") Even if service of the Habitual Offender notice was accomplished prior to the arraignment, it would not conform to the statute and would be void.

The question posed by the Court in its Order of October 12, 2016 is a hypothetical question since service was never accomplished. The Court states: "(1) whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day time requirement under MCL 769.13, and (2) if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13." ("Order," 10/12/16.) The answer to both of these is "no."

The habitual offender statute plainly states: "the prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days **after the defendant's arraignment on the information** charging the underlying offense or, if the arraignment is waived, within 21 days **after the filing of the information charging the underlying offense**." MCL 769.13. (Emphasis added.) Filing the Information and/or habitual offender notice in the District Court is of no consequence as the District Court does not have jurisdiction over trials and sentences of felonies. See, Const. 1963, Art VI, § 1; MCL 600.8311; MCL 766.13. See also, People v Gaines, 53 Mich App 443, 448 (1974) (district court loses jurisdiction upon bind-over.) This being the case, the filing of the Habitual Offender notice prior to the Circuit Court arraignment on the information is meaningless. Secondly, it is not harmless error since there is a specific court rule (MCR 6.112(G)) that deals with the concrete time requirements: harmless error does not apply "to the untimely filing of a notice of intent to seek an enhanced sentence."

Where a statute's language is unambiguous, courts must presume that the Legislature intended the meaning clearly expressed. No further judicial construction is required or permitted, and the statute must be enforced as written. Tryc v Michigan Veterans' Facility, 451 Mich 129, 135 (1996). Courts must give the words of a statute their plain and ordinary meaning, and only

where the statutory language is ambiguous may a court look outside the statute to ascertain the Legislature's intent. Turner v Auto Club Ins. Ass'n, 448 Mich 22, 27 (1995); Luttrell v Dep't of Corrections, 421 Mich 93 (1984); Lansing Sch. Ed. Ass'n v Lansing Bd. of Ed., 487 Mich 349, 371 & n. 18 (2010). Here, the language is simple and clear: the Habitual Offender notice must both filed timely and served for proper jurisdiction to increase the sentence under the habitual offender statutes. MCL 769.13(2). A court must presume that, in enacting a statute, the legislature is familiar with the principles of statutory construction. See, In re Bail Bond Forfeiture, 496 Mich 320 (2014).

In Defendant's case, the written notice was never served. The required notice was not served, and there is no proof of same. The possibility for enhancement, i.e., filing the notice and proof of service under the habitual offender laws, was lost after the 21 day period delineated in the statute expired. The 21-day time limit is a safeguard to Defendant's rights and a prod to the prosecutor to work with dispatch so that a defendant knows what his or her sentencing exposure would be. Id., at 330. Sentence enhancements become important to a defendant when considered whether or not to avail themselves to a plea/sentencing agreement.

The remedy for an untimely filed habitual offender notice is resentencing as a non-habitual offender. Morales, supra. The same result should be required in this case, where there is no proof that the notice was served.

CONCLUSION

Defendant-Appellant Phillip Joseph Swift respectfully requests that this Honorable Court remand for resentencing without the habitual enhancement. In the alternative, Defendant requests leave to be granted.

Respectfully submitted,

Dated: November 6, 2016

Ronald D. Ambrose (P45504)
Attorney for Defendant-Appellant
16818 Farmington Road
Livonia, MI 48154-2974
(c) (248) 890-1361

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

Case No. 13-005130-FC
CofA#: 318680
SCt#: 151439

PHILLIP JOSEPH SWIFT,

Defendant-Appellant.

Kym L. Worthy (P38875)
Attorney for Plaintiff
1441 St. Antoine, 12th Floor
Detroit, MI 48226
(313) 224-5777

Ronald D. Ambrose (P45504)
Attorney for Defendant
16818 Farmington Road
Livonia, MI 48154-2974
(c) (248) 890-1361

PROOF OF SERVICE

I, Ronald D. Ambrose, attorney for Defendant-Appellant Phillip Joseph Swift, certify that on November 6, 2016 I served through first class mail, postage fully prepaid, a copy of the following documents upon counsel for Plaintiff-Appellee, Kym L. Worthy, addressed to Wayne County Prosecutor's Office, 1441 St. Antoine, 12th Floor, Detroit, MI 48226: 1) Defendant-Appellant's Supplemental Brief In Support Of Application For Leave To Appeal.

Dated: November 6, 2016

Ronald D. Ambrose (P45504)
Attorney for Defendant-Appellant
16818 Farmington Road
Livonia, MI 48154-2974
(c) (248) 890-1361